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HEARING

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In the Matter of:

Adjustment of the Rates for
Noncommercial Educational
Broadcasting Compulsory
License

Docket No. 96-6
CARP NCBRA

Library of Congress
James Madison Building
101 Independence Avenue, S.E.
Room LM414
Washington, D.C. 20540

Tuesday,
March 17, 1998

The above-entitled matter came on for
hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson
THE HONORABLE EDWARD DREYFUS
THE HONORABLE JEFFREY S. GULIN

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1 BY MR. RICH:

2 Q You relied, Dr. Owen, on information as to
3 music usage on public and commercial television
4 supplied to you by BMI, is that correct?

5 A That's correct.

6 Q You did not independently secure or seek
7 to secure any such music data, correct?

8 A Correct.

9 Q And you did not develop any of the
10 sampling techniques that were used by BMI, correct, in
11 itself obtaining that data?

12 A Correct.

13 Q And you did not independently test the
14 data's accuracy, did you?

15 A No.

16 Q Now, you conclude at page 6 of your
17 testimony that, "The information BMI has assembled is
18 an adequate basis on which to compare music usage in
19 public and commercial television," do you see that?

20 A Yes.

21 Q That's a rather tepid endorsement, is it
22 not?

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1 A I wasn't intending to endorse it. I just
2 intending to characterize its sufficiency for my
3 purposes.

4 Q You found it to be sufficient?

5 A For my purposes, yes.

6 Q And your purpose was?

7 A To compute an estimate of what the license
8 fee for BMI music on public broadcasting should be,
9 absent subsidies, in a market transaction.

10 Q And it was an attempt to present a today
11 picture of the comparability of music usage, both
12 overall and in terms of BMI music use by public
13 television on the one hand and commercial television
14 on the other?

15 A My intention is to come up with an
16 estimated license fee that is applicable to today. I
17 used the most recently available information that I
18 had.

19 Q Okay. Let's talk about that information.
20 Focusing on the computations dealing with duration of
21 total music use -- we'll get to the BMI portion later,
22 okay?

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1 A Yes.

2 Q -- as to total music use, first public
3 television -- that's page 6 of your written testimony.
4 I take it you rely there on BMI-supplied estimates for
5 the years 1992 and 1995, is that correct?

6 A Yes.

7 Q As to the minutes of music appearing in an
8 average broadcast hour of the sampled universe of
9 programming, true?

10 A Yes.

11 Q And --

12 A Program hour.

13 Q Yes. And to your knowledge, how
14 successful was BMI in securing music use data for the
15 non-PBS program fare? By that I mean for syndicated
16 and locally-produced programming fare shown on public
17 television. Do you have any idea how successful BMI
18 was in securing music use data as to that component of
19 the analysis?

20 A No.

21 Q Did you inquire as to that?

22 A No.

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1 Q You relied totally on the data as supplied
2 by BMI?

3 A Yes.

4 Q Whose reliability you have no knowledge as
5 to?

6 A Right.

7 Q Now, as to network television, on page 7,
8 referred to on page 7, here I take it you combined
9 BMI's music use data with your own estimate of hours
10 of network programming transmitted to arrive, again,
11 at data for the years 1992 and 1995, correct?

12 A Correct.

13 Q And as to local television, which is
14 described at pages 7 and 8 of your testimony, here you
15 relied on a study commissioned by BMI examining music
16 use on non-network commercial local television for the
17 years 1991 and 1992, correct?

18 A Correct.

19 Q And, again, you computed an estimate of
20 the number of hours of broadcasting involved to
21 combine it with the data supplied you, correct?

22 A Correct.

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1 Q From which you derive a 1992 number for
2 music as a percent of program time, is that correct?

3 A Yes.

4 Q And the outcome of that analysis is
5 depicted on Table 1 of page 8 of your testimony,
6 correct?

7 A Correct.

8 Q And so there is no data point for 1995 as
9 to network affiliates, non-network, and non-affiliated
10 stations' music as a percentage of program time for
11 1995, you had no such data, correct?

12 A That is correct. There was entirely too
13 many nons in that.

14 Q All I'm focusing on is the n.a. entry.

15 A I know.

16 Q Okay. Now, you then state right below
17 that, "As shown in Table 1, music usage on public
18 television by this measure is" -- present tense, is --
19 "substantially higher than music usage on commercial
20 television." Do you see that?

21 A Yes.

22 Q Now, my question is: as a technical

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1 matter, how can you sponsor testimony making a
2 statement as to present comparative music usage when
3 the only and most recent year for which you have data
4 comprising the three elements depicted on the chart is
5 1992?

6 A Well, I guess when I wrote the word "is"
7 I had in mind just a description of what the table
8 says, as opposed to a conscious attention to describe
9 the current period. On the other hand, I am assuming
10 that those numbers are still valid for our purposes,
11 because I have no better basis for making such an
12 assumption.

13 And I take some comfort in the fact that
14 even though there is an n.a. in the lower right-hand
15 corner of the table, the middle line of the table
16 suggests not much change in music use for network
17 programs. And much of the non-network programming is
18 so-called off-network programming that used to be on
19 the network.

20 Q But, nonetheless, you would agree, would
21 you not, that fully by your analysis and your appendix
22 Tables 1 and 2, fully two-thirds of all program hours

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1 that occupy commercial broadcast television time are
2 non-network hours, correct?

3 A I don't know if two-thirds is the right
4 number, but it is much greater for stations that --

5 Q It is substantially more on network, is it
6 not?

7 A I imagine one-third is approximately
8 correct.

9 Q I'll indicate to you by my math the
10 network hours, as you computed them, represented 28
11 percent of total commercial broadcast hours, meaning
12 72 percent would reflect non-network. Does that sound
13 about right?

14 A Yes.

15 Q So in drawing a conclusion that you say
16 makes you comfortable as to more recent times, you are
17 lacking data as to 72 percent of the commercial
18 broadcast television universe, correct?

19 A Well, I just explained to you that that is
20 not true. If you'll look at the middle line in the
21 table, which has to do with network programming, we do
22 have a number for 1995 -- not much different from the

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1 number for 1992. And we know that a great deal of the
2 programming that is so-called non-network programming
3 that's on the local stations is reruns of network
4 programming where music use would obviously be the
5 same.

6 Q But you have made no analysis of the
7 overlap as of 1995 in terms of off-network programming
8 as it is called that filtered into the syndication
9 process from the three years prior. You are just
10 speculating as to -- you would be speculating as to
11 the degree of overlap, wouldn't you?

12 A I'm not speculating when I say it's
13 substantial. I don't have a number.

14 Q The fact remains you don't have a number
15 for 1995 for the bottom right-hand entry in this
16 column, correct?

17 A That's correct.

18 Q And so your data are, by definition,
19 incomplete for 1995?

20 A That -- that data is missing, yes.

21 Q And so that the only confident statement
22 you can make, I take it, is as to 1992, based on the

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1 data you have analyzed?

2 A That's the only year for which we have an
3 actual number.

4 Q Now --

5 A I believe it's a reasonable basis for
6 assuming what the number is today.

7 Q Now, let's turn to your analysis following
8 from this on the use of BMI music. Okay? Which
9 follows immediately, I believe, at page 8 of your
10 written testimony?

11 A Yes.

12 Q I take it you report that BMI's 1992 share
13 of music on non-network commercial broadcasts was 45
14 percent, is that correct?

15 A Yes.

16 Q And I take it that comes from Mr.
17 Epstein's work?

18 A Yes.

19 Q Okay. And you further report that BMI's
20 share of music on public television varied from
21 between 32 and 39 percent covering the years 1992 and
22 1996, correct?

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1 A Right.

2 Q Now, I don't see any statement here,
3 unless I have missed it, as to the relevant BMI music
4 percentage covering commercial network television for
5 any of these periods, is that correct?

6 A That's correct.

7 Q There is none?

8 A There is none.

9 Q Why did you omit it?

10 A I didn't have the data. Didn't have the
11 data.

12 Q So that notwithstanding a lack of data as
13 to BMI's music use share on network broadcast
14 television, which is about 28 percent of the total
15 commercial broadcast universe, you nevertheless
16 purport to draw conclusions, do you not, at the bottom
17 of page 8 as to BMI's relative share of music use as
18 between commercial and noncommercial broadcasting,
19 correct?

20 A Yes.

21 Q And that conclusion is that BMI's music
22 use is "about the same" -- top of page 9 -- as on

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1 commercial television, correct?

2 A Yes.

3 Q And so if I'm correct, your overall
4 conclusion as to comparable BMI music use is based on
5 1992 data only as to local TV's use of music, and the
6 absence of any BMI music share data as to commercial
7 local television, correct? And, nonetheless, those
8 conclusions are made?

9 A Yes.

10 Q In a present tense formulation?

11 A No. They're made for the period for which
12 we have data, and I'm using them as a basis for
13 estimating what the fee should be in the present
14 tense, yes.

15 Q And in your mind, that analysis and those
16 gaps, nonetheless, constitute a "adequate basis" for
17 drawing conclusions as to music use, correct?

18 A Yes.

19 MR. RICH: I have no further questions.

20 CHAIRPERSON GRIFFITH: All right.

21 Any redirect?

22 MR. KLEINBERG: Yes, I have some.

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REDIRECT EXAMINATION

BY MR. KLEINBERG:

Q Picking up where we just left off, Dr. Owen, you indicated, I believe -- well, let me focus on the absence of the network numbers. Did you consider whether the absence of data with respect to the networks impacted on your analysis?

A Well, I considered whether the absence of data on the networks would have a significant effect, given the likely magnitude of the quantities involved, yes.

Q And you concluded that it would not have a significant effect, is that correct?

A Well, it seemed to me that there was no evidence in the record that I knew of -- in the testimony that there were significant changes in either the music use levels, overall music use levels, or in the BMI share levels that would change the range, the four to seven percent range that I am -- that I am working with.

I mean, that's a fairly substantial range. These numbers are approximations. And reasonable

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1 changes in either the share or the extent of music use
2 simply isn't likely to affect it very much.

3 Q Now, you said before that you were
4 comfortable, I believe, in looking at the 1992 non-
5 network music use numbers which appear in that chart,
6 because of the numbers that appeared for 1992 and 1995
7 for the network, the 36 percent and the 35 percent on
8 page 8, is that correct?

9 A Yes.

10 Q And that was because of what? What was
11 the reason why you felt comfortable?

12 A Because much of the music that is
13 characterized as non-network is -- both on independent
14 stations and on affiliated stations -- is network
15 reruns. And whatever music use there is on network
16 programs, therefore, eventually becomes music use on
17 non-network programs, off-network programs.

18 Q Did you consider that comparability in
19 terms of off-network and network programming in terms
20 of your review of the absence of any network numbers
21 themselves?

22 A I'm not following you.

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1 Q Did the comparability of the programming
2 between the off-network and the network also lead you
3 to conclude that there was no difference that would
4 obtain to your analysis because of the absence of any
5 specific network numbers for the years in question?

6 A Are you talking about shares now?

7 Q Yes.

8 A Yeah. The same -- to the extent that the
9 share of BMI music and network programming is -- is
10 likely to be the same as the share of music in non-
11 network programming, because it's the same programming
12 with some lag. Then, you would be surprised to find
13 a big difference in the percentage share of BMI
14 programming in network and non-network programming.

15 Q Now, I take it, Dr. Owen, that you
16 indicated your task here was to estimate the fee for
17 the future, correct?

18 A Yes.

19 Q You weren't calculating the fee for the
20 past and whether that was reasonable or not
21 reasonable, is that --

22 A Right.

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1 Q And you indicated you used -- came up with
2 an estimate, a range I guess, of, in fact, several
3 millions of dollars for what this projected fee would
4 be, right?

5 A Yes.

6 Q You didn't imply -- were you suggesting
7 that there is some specific formula that yields an
8 actual dollar amount down to the penny that would come
9 out of your economic analysis for setting of this
10 estimated fee for the future?

11 A No, I don't think there is any one formula
12 that -- that works here. You have to look at a
13 variety of pieces of evidence of this sort. That's
14 the best I can do in terms of coming up with a range
15 of what the commercial outcome would be.

16 Q Now Mr. Rich read you a portion I think,
17 of Dr. Boyle's written testimony about revenue base of
18 public broadcasting. He didn't read you the next part
19 which I would like to see if you understand was the
20 case.

21 This is on page 7 of Dr. Boyle's testimony
22 at paragraph 10, which Mr. Rich read the following:

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1 "As mentioned above from a licensing
2 perspective there is a major difference between
3 commercial and public broadcasting's revenue base, the
4 difference being public broadcasting's receipt of
5 funds from tax base sources such as federal, state and
6 local governments, and funding from public and
7 publicly funded colleges and universities."

8 Dr. Boyle goes on to say, and this wasn't
9 read to you:

10 "While ASCAP could make a strong case for
11 including all funding of public broadcasting from all
12 sources, we have chosen to be conservative."

13 Were you aware of that addition to Dr.
14 Boyle's testimony?

15 A The moment you read it.

16 Q Now, let's go back to this testimony you
17 gave in the Buffalo Broadcasting case in 1981 or 1982.

18 That was an anti-trust case, correct?

19 A Yes.

20 Q And the local television industry was
21 suing BMI and ASCAP claiming the blanket license was
22 an anti-trust violation?

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1 A They were.

2 Q They were claiming that the prices of the
3 music license fees under the blanket license were
4 price fixing and super-competitive prices, is that
5 right?

6 A Generally, yes.

7 Q And you testified in opposition to that
8 claim, correct?

9 A Yes.

10 Q And when you testified that the overall
11 price of music was competitively set, you were talking
12 about the overall price of music as opposed to the
13 component relating to music performing rights?

14 A For purposes of the testimony that was
15 read into the record, I in effect was assuming that
16 the price of performing rights was set above
17 competitive levels.

18 Q And your conclusion was that if you make
19 that assumption, it doesn't matter from anti-trust
20 purposes because the overall price of music, including
21 the synchronization fees and the up front fees would
22 off-set that?

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1 A That is right.

2 Q When you say that the effective price of
3 performing rights is competitively set, is that the
4 same thing as saying there can be no subsidy in the
5 music performing rights license fee?

6 A No, of course not.

7 The music performing rights fee that is
8 set in this proceeding can have a subsidy in it or it
9 can be above competitive levels, it can be anything
10 you like.

11 The fact that there is a competitive
12 offset is a concern from the anti-trust point of view,
13 but has nothing to do with whether or not the
14 performing right fee is at market levels or not.

15 Q And you were speaking in your testimony in
16 Buffalo about the setting of prices as a matter of
17 competition. You weren't doing any Rate Court
18 analysis of what the appropriate price would be for a
19 particular license fee, were you?

20 A No.

21 Q And you have testified that you have
22 looked at the commercial broadcasting recent license

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1 deals with BMI, correct?

2 A Yes.

3 Q And would I be correct that you would say
4 that those fees, from an anti-trust point of view,
5 were competitively set?

6 A I think so.

7 Q And that would be because of the taking
8 into account of the up front payments and the
9 synchronization fees as well as the music performing
10 rights component, correct?

11 A Yes, and for the other reasons why blanket
12 license fees are, in my view, competitively set.

13 Q And is the fact that you believe the
14 commercial broadcasting license fees were
15 competitively set mean that we shouldn't look to the
16 commercial license fees to determine what the price
17 should be for the public broadcasting license in the
18 future?

19 A No, it seems to me that that is
20 appropriate.

21 Q And if you assume that the 1992 BMI PBS,
22 Public Broadcasting license was competitively set,

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1 does that mean there couldn't be a subsidy component
2 as part of that deal?

3 A No.

4 Q Why not.

5 A Because the price for the performing right
6 could be below what a free market commercial rate
7 would be, even though the overall price of music was
8 competitively set.

9 In other words, there could still be a
10 subsidy in effect running from up front rights to
11 performing rights.

12 Q Does the fact that the parties voluntarily
13 entered into a license agreement in 1992 meant hat
14 there could not have been subsidy component contained
15 within that license fee?

16 A No.

17 Q Do you understand that Congress has
18 indicated in this compulsory license proceeding there
19 is supposed to be no subsidy?

20 A That is my understanding.

21 Q Did you attempt to estimate what a
22 subsidy-free license would be?

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1 A Yes. That was the assignment.

2 Q And that is what you did?

3 A Yes.

4 MR. KLEINBERG: No further questions.

5 CHAIRPERSON GRIFFITH: All right.

6 MR. SCHAEFFER: I think I have a question.

7 CHAIRPERSON GRIFFITH: You want to cross
8 examine?

9 MR. SCHAEFFER: Yes.

10 CHAIRPERSON GRIFFITH: Okay.

11 CROSS EXAMINATION

12 BY: MR. SCHAEFFER

13 Q Good afternoon, doctor. As you know I am
14 counsel for ASCAP.

15 You had been asked a question by Mr. Rich
16 about whether the following would be a factor in
17 making your determination as to what would be a fair
18 market value or a proper rate, and that was the
19 ability of public broadcasting to pass along enhanced
20 costs of doing business.

21 You were asked if that was a factor and
22 you said it was irrelevant.

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1 Could you enlighten us and tell us why you
2 think that to be irrelevant?

3 A The ability of any producer of goods and
4 services to 'pass along' a cost change has nothing to
5 do with what the proper price is for the input causing
6 the cost change.

7 Q Now I suppose that in states where there
8 would be subsidization you would have a concept of
9 each according to his means and to each according to
10 his needs. In that kind of economics that would be a
11 factor, correct?

12 A I am not sure I completely follow you.

13 Q I withdraw the question.

14 CHAIRPERSON GRIFFITH: All right.

15 MR. RICH: Just one or two questions, if I may?

16 CHAIRPERSON GRIFFITH: All right.

17 RECROSS EXAMINATION

18 BY: MR. RICH

19 Q Returning to the music use analysis you
20 conducted, Dr. Owen, if the case were that BMI has a
21 substantially higher share of music use on commercial
22 network television than it does on commercial local

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1 television.

2 As a matter of analysis, you would agree,
3 would you not, that that would have an impact on the
4 conclusion as to the relative shares that BMI has in
5 the public and commercial television sectors?

6 A I am sorry, I don't see why.

7 Q Let's --

8 A I really don't understand you
9 hypothetical.

10 Q I take it that your data showed that BMI
11 had a 45 per cent music use share in local television.

12 A Yes.

13 Q Assuming that on the network side where
14 you have no data it were 60 per cent, I take it then
15 that that would numerically affect the analysis and
16 the conclusion as to the comparability of use between
17 public television and a commercial broadcast, correct?

18 A Yes.

19 Q Are you aware whether, in fact, BMI has
20 made assertions of being the majority music supplier
21 to broadcast network television?

22 A No.

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1 MR. RICH: No further questions.

2 CHAIRPERSON GRIFFITH: All right.

3 Judge Dreyfuss?

4 JUDGE DREYFUS: Yes, one question.

5 THE WITNESS: Yes, sir.

6 JUDGE DREYFUS: In indicating the
7 similarity between public broadcasting and commercial
8 broadcasting, you indicate on page two that both
9 industries provide the same or similar types of
10 programming including news, drama, comedy, drama,
11 children's programming and musical performances, and
12 I know that isn't an exhaustive list, but there is no
13 mention of sports.

14 THE WITNESS: That is true.

15 JUDGE DREYFUS: Which is, I think, a major
16 revenue-producing category for commercial
17 broadcasting, is it not?

18 THE WITNESS: Certainly for networks, yes.

19 JUDGE DREYFUS: So, does your general
20 statement that both industries provide the same type
21 of programming include the sports or exclude the
22 sports area?

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1 THE WITNESS: I am not claiming the
2 programming is identical; it is obviously not
3 identical. There are a number of similarities and I
4 am looking for the best benchmark I can find.

5 It is as if you were trying to estimate
6 the market value of your house, you compare it with
7 other houses on the street that are similar but aren't
8 usually identical and look for points of comparison
9 that make sense and adjust for the differences.

10 JUDGE DREYFUS: Okay, thank you.

11 MR. KLEINBERG: I have a follow-up
12 question if I might.

13 (LAUGHTER)

14 THE WITNESS: I thought I was going to
15 escape.

16 REDIRECT EXAMINATION

17 BY: MR. KLEINBERG

18 Q Dr. Owen, does the consideration of the
19 relative music usage take into account the actual
20 differences in the programming that may exist between
21 commercial and public usage?

22 A As far as music use is concerned, of

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1 course.

2 Q Your analogy to the house example, how is
3 that applied to, for example, why you wouldn't look at
4 the 1992 agreement as the best benchmark in terms of
5 comparing to the commercial?

6 A I guess the analogy would be if you were
7 trying to figure out the value of your house would it
8 be more accurate to look at comparable houses in which
9 there were recent transactions or to look at the value
10 that your house had or the price at which it had sold
11 some number of years in the past. All the information
12 is useful and you shouldn't ignore any of it, but
13 generally, at least in the real estate market, current
14 comparative data are what gets used to come up with
15 estimates of what a market price would be.

16 MR. KLEINBERG: Thank you, Dr. Owen.

17 MR. SCHAEFFER: I have one question for
18 follow-up.

19 Do you know if sports programming is
20 regarded as music-intensive in the broadcasting
21 industry or using less music than most other forms of
22 programming?

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1 THE WITNESS: I don't know.

2 MR. SCHAEFFER: You don't know.

3 THE WITNESS: I have heard music on sports
4 programs. That is the limit of my understanding.

5 CHAIRPERSON GRIFFITH: All right, Dr.
6 Owen, you can step down, sir. You are free to go.
7 Thank you very much.

8 THE WITNESS: Thank you.

9 MR. KLEINBERG: Mr. Salzman is going to be
10 handling the next witness for us.

11 CHAIRPERSON GRIFFITH: All right.

12 MR. SALZMAN: Would it be appropriate to
13 take a break at this time? I believe the whole
14 testimony is not that many minutes all together but I
15 would like to take a break of a couple of minutes.

16 CHAIRPERSON GRIFFITH: All right, we will
17 take our morning recess.

18 MR. WEISS: Your Honors, I would just
19 indicate, given our expected cross, we should be done
20 well in advance of lunch time today and I think that
21 will be the end of the witnesses for today.

22 CHAIRPERSON GRIFFITH: That is certainly

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1 encouraging Mr. Weiss.

2 (Whereupon, the proceedings were recessed
3 from 11:27 a.m. until 11:39 a.m. and resumed in Open
4 Session.)

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CERTIFICATE

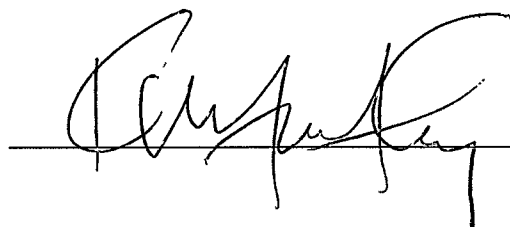
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Date: March 17, 1998

Place: Washington, DC

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A handwritten signature in black ink, written over a horizontal line. The signature is stylized and appears to be "R. J. [unclear]".